RECORD AND BRIEF

No. 15-1500

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In The
Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF NINTH AND TENTH CIRCUIT TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTEREST OF AMICI CURIAE

Pursuant to this Court's Rule 37.3, amici curiae Pala Band of Mission Indians, Redding Rancheria, Table Mountain Rancheria, Yocha Dehe Wintun Nation, Puyallup Tribe of Indians, Colorado River Indian Tribes, Gila River Indian Community, Elk Valley Rancheria, Ewiiaapaayp Band of Kumeyaay Indians, Jamul Indian Village, Modoc Tribe of Oklahoma, Mooretown Rancheria, Paiute Indian Tribe of Utah, Port Gamble S'Klallam Tribe, Pueblo de Cochiti, Pueblo de San Ildefonso, Pueblo of Jemez, Pueblo of Laguna, San Manuel Band of Mission Indians, Taos Pueblo, and Twenty-Nine Palms Band of Mission Indians (collectively "Amici Tribes" or "Amici") respectfully recommend that this Court affirm the determination below that immunity extends to individual tribal officials and employees, like Respondent, who have allegedly caused injury due to ordinary negligence while acting within the scope of their employment.[1]

Amici and other federally recognized Indian tribes are "'distinct, independent political communities'" preexisting the United States Constitution, and as such "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed

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[1] This brief is filed with the consent of both Petitioners and Respondent, and correspondence reflecting those consents has been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, Amici Tribes state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amici Tribes or their counsel, have made a monetary contribution to the preparation or submission of this brief.

by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 58 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

Amici's tribal governments comprise executive bodies, regulatory agencies, tribal legislatures, and tribal courts, all of which necessarily act through natural persons who staff them. Amici Tribes have a strong interest in a rule that permits their officials and employees to make decisions without fear that their duties will expose them to the indignity and disruption of a tort suit in a foreign forum or imperil their personal financial well-being.

Amici Tribes urge this Court to adopt a rule recognizing their officials' and employees' efforts to ensure the public safety of their tribal citizens and non-Indians alike. For the most part, Amici Tribes' reservations are located in rural communities, distant from nontribal emergency response services. Amici Tribes thus provide fire protection, paramedic services, search and rescue services, and police protection, both on tribal land and frequently to their neighbors outside their reservations through mutual aid agreements. Through their service to tribal governments, tribal emergency services employees risk their own lives to protect others.

Forcing these public servants to face suit, and potentially devastating personal liability, in foreign courts creates disincentives to provide these vital services. Moreover, subjecting tribal employees to a maze of state and local court jurisdiction would be flatly

contrary to Congress's consistent and oft-repeated policy of tribal self-government and self-determination.

The experiences of Amici Tribes demonstrate that even individual-capacity tort suits nominally against tribal officials deplete the tribal fisc. Amici Tribes are forced to defend tribal officials who face lawsuits for exercising their tribal duties. Not only is this essential to retaining qualified employees, it is necessary to safeguard tribal sovereignty and to protect the processes of tribal government from potential overreach or interference by foreign tribunals. As responsible government employers, tribes purchase insurance to cover their officials and employees. The more exposed tribal employees are to suit, the more the tribes pay for insurance out of their limited coffers. Accordingly, any notion that Indian tribes do not bear the cost of suits against their officials is a fiction.

Amici Indian tribes operate tribal governments in federal districts under the appellate jurisdiction of the United States Courts of Appeals for the Ninth and Tenth Circuits. Courts in both of these circuits have permitted plaintiffs to circumvent tribal sovereign immunity by merely naming tribal employees individually, and by seeking to recover the employees' personal assets rather than tribal assets. Because Petitioners and the Government each advance pleading-focused rules, Amici Tribes' experiences will help inform the Court as to the dire implications of such a rule denying to tribal officials those immunities from state tort law that other governments' officials possess.

SUMMARY OF ARGUMENT

This Court has recently confirmed that Indian tribes possess immunity for both their on- and off-reservation activities, whether these activities are commercial or governmental in nature. Indian tribes, like other governments, can only act through natural persons. Thus, immunity for the persons through whom tribal governments must necessarily act is, like the immunity of Indian tribes themselves, "'a necessary corollary to Indian sovereignty and self-governance.'" *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

Petitioners contend categorically that "[t]he sovereign immunity of an Indian tribe does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." Pet. Br. 5. In other words, according to Petitioners, a plaintiff's decision to name a tribal official in the official's individual capacity automatically renders the official subject to suit. Likewise, the Government contends that "suits seeking to recover damages from the officer or employee personally are not considered suits against the sovereign, even though they arise out of the agent's work for the sovereign, and they therefore are not barred by sovereign immunity." U.S. Br. 10-11. These proposed rules would permit a plaintiff to completely control, through artful pleading, whether or not a tribal official or employee could assert immunity to state tort claims, regardless of whether the employee

was performing duties on or off tribal land, exercising governmental discretion or performing ministerial work, or engaging in commercial or governance activity. Amici Tribes' experience operating under legal regimes applying rules like Petitioners' and the Government's demonstrates the detrimental effect of such rules on tribal self-governance and tribal sovereignty.

In contrast to absolute or qualified immunity protections that attach based on the nature of officials' actions, Petitioners' and the Government's proposed rules enable any plaintiff, through a pleading device, to circumvent the immunity of tribal officials and employees. As Congress repeatedly has recognized, government cannot operate properly under such a rule, which forces government employees to perform their official duties in fear of suit for personal liability under state tort law. Such concerns similarly hamper tribal governmental operations. Moreover, suits against tribal officials result in the indignity of exposing their governance duties – and internal governmental considerations, many of which are confidential – to foreign public tribunals. Such suits also necessarily direct officials' time and energy away from tribal governance. Recognizing these concerns, this Court has acknowledged the immunity of federal officials' executive, legislative, and judicial activity from state tort liability. Tribal governmental officials should continue to be afforded no less than the same immunity.

The Ninth and Tenth Circuits' moves toward pleading-focused rules, however, have spawned just the sort of litigation that is toxic to good governance.

Tribal executives, legislators, and regulators, have faced personal suits targeting their official governmental acts, such as administration of tribal property, regulation of tribal gaming facilities, and even retention of legal counsel to defend litigation and to petition the courts on a tribe's behalf. These suits are disruptive to the tribal officials who must defend their acts of governance in foreign courts. Even worse, the indignity these lawsuits visit echoes throughout Indian country, sapping the resolve of other officials entrusted to make hard decisions on which their people depend.

A pleading-focused rule is not only injurious to actions at the upper echelons of tribal government, but also to basic public health and safety services, frequently carried out by Amici Tribes' police, fire, and emergency health services officers pursuant to mutual aid agreements with nearby non-Indian communities. Congress already has unambiguously rejected such a pleading-focused rule as it pertains to federal employees precisely because of the rule's negative impacts on such core governmental functions. To avoid extending those negative impacts to tribal employees, this Court should eschew Petitioners' proposed rule and decline the Government's invitation to limit immunity to tribal employees or officials exercising discretionary judgment.

Finally, subjecting tribal officials to individual-capacity suits would substantially and uniquely impact tribal treasuries, in direct contravention of Congress's repeated retention of sovereign immunity as a means

of encouraging tribal self-government, self-sufficiency, and economic development.

ARGUMENT

I. Petitioners' and the Government's Proposed Rules Undermine Tribal Self-Government and Public Safety.

As governments preexisting the United States Constitution, Amici Tribes have the right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Amici Tribes have exercised this sovereign authority to engage in governmental activities as diverse as legislating regarding tribal affairs, regulating tribal lands, regulating governmental gaming facilities, operating tribal court systems, providing firefighting services, police protection, and emergency medical services, and forging government-to-government relationships with states, localities, and the federal government.

This Court recently affirmed that Indian tribes' common-law immunity from suit is one of the "core aspects of sovereignty that tribes possess," subject only to congressional divestment. *Bay Mills*, 134 S. Ct. at 2030. Although Congress has plenary power over Indian tribal self-government, it can only strip aspects of tribal self-government away by "clear" and "unequivocal[]" statements. *Id.* at 2031 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S 411, 418 (2001)). As a necessary corollary, "courts will

not lightly assume that Congress in fact intends to undermine self-government." *Id.* at 2032. Preserving Indian tribes' immunity to the officials and employees through whom they must act is necessary to safeguarding this sovereignty. *Cf. Bay Mills*, 134 S. Ct. at 2030; *see Barr v. Matteo*, 360 U.S. 564, 571 (1959).

Petitioners' proposed rule, however, would strip immunity from tribal employees and officials at all levels of government, subjecting them to private lawsuits under state tort law challenging actions that are essential to tribal self-governance. Amici Tribes' experiences under regimes of this sort demonstrate that such a pleading-focused rule interferes with the already-difficult, and resource-limited, endeavor of governing an Indian tribe.

A. Principles of Common Law Official Immunity Are Applicable to Tribal Government Officials and Employees.

This Court has long recognized that all branches of government work best when their officials' acts of governance are immunized from suit. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (subjecting executive officials to civil suit for damages "would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.");

Stump v. Sparkman, 435 U.S. 349, 355 (1978) (recognizing as "'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself'") (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)).

This Court also has recognized that common law immunity is necessary to allow federal employees "to exercise their duties unembarrassed by the fear of damage suits[,] . . . the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr*, 360 U.S. at 571. Not only do such suits "consume time and energies which would otherwise be devoted to governmental service," *id.*, but they also expose officials to the "indignity" of facing "the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

1. Preserving immunity for tribal employees for ordinary torts committed within the scope of employment fully comports with Congress's interpretation of the common law of governmental immunity applicable to Indian tribes as well as to the federal government. Indeed, this Court has acknowledged that tribal self-governance is uniquely vulnerable to foreign judicial process. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,

60 (1978) ("[R]esolution in a foreign forum of intra-tribal disputes of a more 'public' character . . . cannot help but unsettle a tribal government's ability to maintain authority."). Subjecting tribal employees to tort suits in state courts would force tribes to defend their interests in, among other places, municipal courts, county courts, and state courts: that is, in a range of courts with a variety of procedures, requirements, and limitations. Those lower level, nontribal courts often have judges unfamiliar with rudimentary concepts of Indian law, even with such basic, fundamental concepts as Indian tribes' status as governments. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566-567 (1983) (recognizing "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"). Additionally, experience suggests that Indian tribes, which are often geographically remote and with limited treasuries, suffer greater performance disruption in the face of such suits than their federal and state counterparts. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward A Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 Ariz. St. L.J. 987, 1023 (1994).

Petitioners' and the Government's proposed rules are precisely the sort that threaten to "inhibit the fearless, vigorous, and effective administration of policies" of tribal government. *See Barr*, 360 U. S. at 571. Apart from the indignity of being haled into court by private parties aggrieved by policy decisions, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, defending litigation distracts from the business of governing. *Barr*,

360 U. S. at 571. Permitting any plaintiff to strip any tribal official of immunity simply by pleading "individual-capacity damages actions," Pet. Br. 5, would encourage political opponents, business rivals, or opponents of tribal sovereignty to subject officials at all levels of tribal government to tort suits in foreign courts. *See Butz v. Economou*, 438 U.S. 478, 515 (1978).

2. In advancing their pleading-focused theory of tribal immunity, Petitioners and the Government seek to resurrect the interpretation of common law immunity that Congress has explicitly overridden precisely because it undermines good governance. In 1988, this Court opined in *Westfall v. Erwin*, that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding [a federal] official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." 484 U.S. 292, 296 (1988). Less than a year later, Congress directly overruled *Westfall* by passing the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. §§ 2671-2680) ("Westfall Act").

Congress found that *Westfall* "seriously eroded the common law tort immunity previously available to Federal employees," thereby creating "an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation." Westfall Act, § 2(a)(4)-(5), 102 Stat. at 4563. Congress also noted that "the prospect of such liability will seriously undermine the morale and well being of Federal

employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." *Id.* at § 2(a)(6); *see also* 134 Cong. Rec. S15,214 (daily ed. Oct. 7, 1988) (statement of Sen. Grassley) (observing "[t]he prospect of years of personal litigation against the Federal work force not only has a devastating impact on individual civil servants' pocketbooks, credit ratings, and morale, but will severely inhibit the ability of many agencies to carry out their mission").

The congressional findings and legislative history of the Westfall Act make clear that Congress "sought to override" this Court's decision in *Westfall* and "return Federal employees to the status they held prior to" the decision. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-426 (1995) (quoting H.R. Rep. No. 100-700, at 4 (1988)). Congress has unequivocally expressed the view that the public is best served when immunity protects individuals performing governmental duties, without regard to whether those duties are discretionary.

Petitioners and the Government suggest that *Westfall* is valid law that justifies imposing liability on certain tribal employees. Pet. Br. 16-17, 22 n.2; U.S. Br. 26-27. But as noted above, the Westfall Act recognized that the immunity of federal employees acting in the course of their employment is a "common law tort immunity," and in "overriding" this Court's decision, Congress restored this immunity to such employees. Of course, the Westfall Act did not explicitly address tribal

employees, but neither did this Court's decision in *Westfall*. Congress's reversal of *Westfall* is quite the opposite of a "clear" and "unequivocal[]" statement that would authorize extending the *Westfall* decision to tribal employees. *See Bay Mills*, 134 S. Ct. at 2031. To the contrary, there is no indication that Congress has sought to remove or limit the common law immunity of tribal employees and officials as Petitioners request, and this Court should decline their invitation.

B. Pleading-Focused Rules Facilitate and Encourage Suits Challenging Tribal Officials' Acts of Governance, Thereby Undermining Tribal Self-Government.

Under legal regimes like the one Petitioners propose, the plaintiff's bar repeatedly has sought to circumvent the immunity of Indian tribes by suing tribal employees and officials for their acts of self-governance. The negative effects of this phenomenon are especially pronounced in the Ninth and Tenth Circuits, where longstanding rules protecting tribal officials and employees from tort liability have been undermined by decisions permitting plaintiffs' counsel to determine whether tribal employees must face suit for their official actions. Amici Tribes' experiences in the wake of these pleading-focused decisions give life to this Court's concerns about the harm suits for damages visit on effective governance.

1. Consistent with this Court's precedents, the Tenth Circuit previously held that tribal government

officials' immunity from money damages depended on whether they "acted outside of their official authority, and thus, are not entitled to sovereign immunity." *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (holding tribal governor and other tribal officials not immune to money damages claims for actions "outside of their official authority" relating to the alleged theft of plaintiffs' crops).

Later, the Tenth Circuit changed course, announcing a rule that "[t]he general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities." *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). The Tenth Circuit opined that immunity does not bar a suit "seek[ing] money damages from the officer 'in his individual capacity' . . . 'so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.'" *Id.* at 1297 (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)); *but see Burrell v. Armijo*, 603 F.3d 825, 832-833 (10th Cir. 2010) (mentioning *Native American Distributing*, but immunizing tribal governor and lieutenant governor from damages claims on the basis that "sovereign immunity generally extends to tribal officials acting within the scope of their official authority" and "hinges on the breadth of official power the official enjoys").

2. The Ninth Circuit recently experienced a similar about-face. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), the Ninth Circuit

held tribal officials immune from money damages claims where they were named in their individual capacities for allegedly voting to exclude plaintiff from tribal land in violation of federal law. *Id.* at 478-480. The court's individual immunity analysis turned on whether tribal officials "were acting within the scope of their delegated authority." *Id.* at 479-480. The Ninth Circuit later confirmed that state law tort claims challenging acts of tribal governance by Amicus Pala Band of Mission Indians officials were barred even if pled against tribal officials. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). The court observed that defendant officials' "votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury." *Id.* Thus, immunity attached to the tribal officials' acts of governance. *Id.* at 1272; *see Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (holding a plaintiff cannot circumvent an Indian tribe's immunity by naming a tribal officer instead).

Then, in 2013, the Ninth Circuit suddenly announced a "remedy-focused analysis" for evaluating tribal officer immunity. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). In *Maxwell*, the plaintiffs sued tribal paramedics for their split-second decisions attending to a gunshot victim. *Id.* at 1080, 1087. Taking a cue from the Tenth Circuit's pivot in *Native American Distributing*, the panel held that, "[n]ormally, a suit like this one – brought against individual officers in their individual capacities – does not

implicate sovereign immunity," so long as "[t]he plaintiff seeks money damages 'not from the state treasury but from the officer[s] personally.'" *Id.* at 1088 (quoting *Alden*, 527 U.S. at 757). The *Maxwell* panel thus announced a "general rule that individual officers are liable when sued in their individual capacities." *Id.*

3. Although the *Native American Distributing* panel said the case before it relieved it from "wad[ing] into this swamp" of tribal officer sovereign immunity, 546 F.3d at 1297, the court's commentary has ultimately had far-reaching implications for Amici Tribes and across Indian country. The resulting pleading-focused rules have given plaintiffs virtually complete control over whether tribal officials must face suit for their acts of tribal governance, and plaintiffs in the Ninth and Tenth Circuits have enthusiastically wielded this bludgeon against tribes.

The defects inherent in Petitioners' proposed rule were evident when, adhering to the Tenth Circuit's *Native American Distributing* decision, an Oklahoma district court allowed a multimillion-dollar damages claim to proceed against six officials of the Fort Sill Apache Tribe's governing body, including the Tribe's chairman, for actions they took as tribal officials. *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009). The plaintiffs brought trespass claims after the Bureau of Indian Affairs rejected a lease of plaintiffs' property to the tribe, alleging that the tribe thereafter left certain tribally owned fixtures on the property without permission. *Id.* at 1276. The court acknowledged that the individual defendants

"could perhaps vote to have the Tribe move the fixtures, but acting individually, they would have no authority to remove the Tribe's fixtures." *Id.* at 1285. Still, the court held that the "claims for money damages from each of these individual defendants, sued in their individual capacities, are not barred, so long as it is clear plaintiffs seek money damages from the individual defendants personally and not from the Tribe." *Id.* (citing *Native American Distrib.*, 546 F.3d at 1297).

Even the Ninth Circuit's *Maxwell* decision, while stripping tribal officials of immunity to damages claims, acknowledged that suit challenging tribal governance functions "attack[s] 'the very core of tribal sovereignty.'" *Maxwell*, 708 F.3d at 1089 (quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995)). Nevertheless, the Ninth Circuit later permitted suit alleging high-level tribal officials and law enforcement officers were liable for money damages for their acts of governance. In *Pistor v. Garcia*, plaintiffs sued the chief of the tribe's police department, a tribal gaming office inspector, and the general manager of the tribe's gaming facility, who were exercising regulatory and law enforcement authority the tribe validly conferred under federal law and pursuant to a tribal-state compact. 791 F.3d 1104, 1109 & n.1 (9th Cir. 2015); *see* 25 U.S.C. § 2701(5) (recognizing tribes' "exclusive right to regulate gaming activity on Indian lands"). Despite reiterating "*Maxwell*'s caution about masked official capacity suits" pled against tribal officials, the *Pistor* panel brushed off any suggestion that suing tribal officials for damages for their governance of tribal gaming

would "'interfere with [tribal] administration, . . . [or] restrain the [Tribe] from acting.'" *Pistor*, 791 F.3d at 1113 (quoting *Maxwell*, 708 F.3d at 1088). The court thus denied immunity to high-level tribal officials and law enforcement officers sued in their individual capacities, under state tort law, for their participation in a criminal investigation on tribal land. *Id.* at 1108-1109, 1115.

A California court of appeal also recently allowed claims to proceed against tribal officials for regulating the tribe's gaming facility simply because the complaint sought damages against the officials in their personal capacities. *Cosentino v. Fuller*, 237 Cal. App. 4th 790, 189 Cal. Rptr. 3d 15 (2015), *as modified on denial of reh'g* (June 22, 2015), *as modified* (June 25, 2015), *ordered not to be officially published* (Sept. 23, 2015). The plaintiff's only alleged injury was the loss of his tribally issued gaming license, effected by defendants' votes in their capacity as tribal gaming commissioners.[2] *Cosentino*, 189 Cal. Rptr. 3d at 21; *see Imperial Granite*, 940 F.2d at 1271. The court nevertheless opined that it was solely for plaintiff "to decide what claims to allege, against whom to allege them, and in what capacity to name Defendants," noting that plaintiff "sought monetary damages against Defendants only in their individual capacities." *Cosentino*, 189 Cal. Rptr. 3d at 25.

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[2] In parallel federal litigation, the tribe and its gaming commission secured dismissal of plaintiff's claims on the basis of sovereign immunity. *Cosentino v. Pechanga Band of Luiseño Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016).

Although the *Cosentino* defendants, joined by numerous California Indian tribes, successfully convinced the California Supreme Court to order depublication of the opinion, *Cosentino v. Fuller*, S227157, Sept. 23, 2015 (Cal.), the court of appeal's decision remained the law of the case for the tribal officials on remand. Cal. Rules of Court, Rule 8.1115(b)(1). Undeterred by the depublication order, the attorney who had brought the *Cosentino* case filed suit two days later against the chairman of Amicus Pala Band of Mission Indians challenging his acts governing the tribe. Complaint, *Pink v. Smith*, No. 37-2015-00032613-CU-BT-CTL (Cal. Super. Court, San Diego County, September 25, 2015) (on file with counsel). The suit pled claims under state tort law alleging the chairman violated federal, state, and tribal law in causing the tribe to retain legal counsel to undertake the depublication effort and defend other litigation. *Id.* ¶¶ 21-41, 56. On behalf of a disgruntled tribal member, the suit sought $600,000 in damages from the chairman personally, for his official acts of governance. *Id.* ¶ 74.

Experiences in *Pistor* and *Cosentino* confirm this Court's warning that "[a]n individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts." *Butz*, 438 U.S. at 480; *see also* 134 Cong. Rec. S15,214 (statement of Sen. Grassley) (indicating that "Westfall-type suits will be employed simply to harass and intimidate Federal employees who are only trying to do their jobs").

Recognizing this concern, the *Butz* Court held that persons who adjudicate in an administrative agency require the absolute immunity other executive officers possess. 438 U.S. at 512-513 (reversing denial of absolute immunity to administrative agency officials accused of instituting retaliatory administrative proceeding). This is especially true because, even when officials successfully defend litigation, governance has already suffered its effects. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982))).

In sum, rules like Petitioners' have already spawned suits exposing officials governing Amici Tribes and other tribal sovereigns to the disruption, fear, and indignity of facing the peril of suit and tort liability in a foreign forum. Amici Tribes' experiences counsel against a rule that leaves public servants throughout Indian country similarly exposed.

C. Petitioners' and the Government's Proposed Rules Undermine Tribal Security and Emergency Services Protecting Tribal Citizens and the Public at Large.

A pleading-focused approach to state law tort liability for tribal officers and employees also undermines another critical core tribal government function – protecting public health and safety. These concerns are

especially keen in and around Amici Tribes' reservations. Many reservations are rural and noncontiguous, necessitating close cooperation with neighboring non-Indian jurisdictions. This routinely requires tribal employees to perform their duties both on- and off-reservation – including police, firefighting, and paramedic services that are often dangerous and risky. Petitioners' view, under which these individual tribal officials and employees could be held liable for performing their tribal duties, would make recruitment and retention of first responders difficult, would chill and diminish tribal participation in mutual aid agreements that provide public health and safety services, and would negatively impact the delivery of these essential services to Indian and non-Indian communities alike. Such a rule would also hinder tribes' inherent right to exclude noncitizens from their reservations and protect persons within tribal territory by opening up tribal officers to suit for the exercise of tribal law.

1. The Provision of Public Safety and Emergency Services Through Mutual Aid Agreements Is Essential to the Functioning of Tribal Governments and to Non-Indian Communities.

Like most federally recognized tribes, most Amici Tribes and their reservations are situated in rural and sparsely populated areas. Some Amici Tribes, like the Yocha Dehe Wintun Nation, Pala Band of Mission Indians, Gila River Indian Community, and Mooretown

Rancheria provide their own fire protection and emergency services through tribal fire departments, staffed with paid, professional, full-time firefighters. These tribal firefighters protect tribal land, schools, health facilities, and other enterprises and serve and protect not only tribal citizens, but visitors, guests, and employees. They also provide fire service, paramedic protection, and advanced life support to residents in surrounding communities. Other Amici Tribes, such as Redding Rancheria, Table Mountain Rancheria, Ewiiaapaayp Band of Kumeyaay Indians, Elk Valley Rancheria, and Jamul Indian Village have no fire department but depend on neighboring local, tribal, or state fire departments for fire and emergency medical response.

For example, Amicus Yocha Dehe Wintun Nation has a highly trained and skilled fire department based on its trust land in Yolo County, California. The 35-member Yocha Dehe Fire Department ("YDFD") serves not only tribal lands but also provides critical emergency services to neighboring rural, underserved communities throughout Yolo County (and beyond) by way of a series of mutual aid agreements and automatic aid agreements. Out of more than 30,000 professional fire departments nationwide, YDFD is one of the only 234 career fire departments accredited by the Commission on Fire Accreditation International. Of the 18 fire departments in Yolo County (the rest of which are nontribal), YDFD is one of only two departments certified to perform search and rescue and swift-water rescue operations, and one of only three fire agencies

in the county certified for confined space and trench rescue operations. Of the 30 line YDFD firefighters, 22 are licensed as paramedics, a proportion far higher than other fire departments, whether rural or urban.

Similarly, Amicus Pala Band of Mission Indians operates a modern, fully equipped fire department with 31 full-time fire suppression personnel and up to 15 reserve firefighters, which serves not only its reservation community and casino, but also responds to calls for fires, traffic accidents, and paramedic needs that occur outside its reservation's boundaries.

Small rural communities near or adjacent to tribal lands typically have only volunteer fire departments staffed with part-time firefighters whose level of resources vary widely from community to community.[3] For residents in these communities, the nearest county-provided full-time professional fire department may be more than an hour away. Similarly, the availability and level of emergency medical care offered on tribal lands and in adjacent communities varies widely. Many volunteer fire agencies only offer the services of an emergency medical technician ("EMT") and do not employ paramedics, who have far more training and are qualified to administer a significantly broader

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[3] For example, in Guinda and Capay, California, the two towns closest to Yocha Dehe's territory, the local fire departments are part-time, volunteer organizations with limited training.

range of medical procedures than EMTs.[4] In the case of the YDFD, it is the *only* fire agency in Yolo County with paramedics on staff. Thus, the existence of a highly trained and sophisticated fire department on Indian land provides an important tangible benefit to nearby communities.

Like many tribes, several Amici provide such services to noncontiguous tribal land bases, and their tribal employees regularly traverse tribal trust land, tribe-owned fee land, and off-reservation non-Indian lands, sometimes multiple times in a single day. Other tribes like Amicus Redding Rancheria currently exercise jurisdiction over smaller, cohesive land bases. However, as these tribes gradually reacquire (often noncontiguous) tribal land bases previously lost to them, mutual aid agreements will likely become a necessity.

To ensure the availability of the highest level of firefighting and emergency medical services on tribal lands and in adjacent communities, tribes and tribal fire departments enter mutual aid agreements with

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[4] In California, EMTs need only 120 hours of training, Cal. Code Regs. tit. 22, § 100074, and may transport patients and provide advanced first aid including CPR. Paramedics, by contrast, must have 1,090 hours of instruction and are trained in all elements of pre-hospital advanced life support. *Id.*, §§ 100139, 100158. Paramedics are authorized to administer drugs intravenously, take blood samples, operate defibrillators, intubate patients, and carry out other specified medical procedures. *Id.*, § 100146.

state and local agencies.[5] These agreements are essential in addressing the "complexity, uncertainty, and cost of state and tribal jurisdiction in Indian country," *Cohen's Handbook of Federal Indian Law* § 6.05 (2012 ed.), and allow for the coordination of information, resources, and priorities among the participating fire departments and agencies. They also typically provide that the nearest agency to the incident will respond – or provide required backup services – regardless of the jurisdiction in which the incident occurs.[6]

The YDFD, for example, has entered into three separate mutual aid agreements, including the statewide California Fire Assistance Agreement, as well as four "automatic aid" agreements to provide fire and emergency response services to communities located off tribal land and for nontribal backup in the event of a major incident on tribal land. As a result of these agreements, the YDFD is regularly dispatched by the Yolo County Communications Center to incidents off tribal land, so approximately one-third of all YDFD services (240 out of 695 service responses over

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[5] *See, e.g.*, Cal. Health & Safety Code § 13863(a) ("A [fire protection] district may enter into mutual aid agreements with any federal or state agency, any city, county, city and county, special district, *or federally recognized Indian tribe*.") (emphasis added).

[6] *See, e.g.*, Cal. Code Regs. tit. 19, § 2415(a), defining "mutual aid" as "voluntary aid and assistance by the provision of services and facilities, including but not limited to: fire, police, medical and health, communication, transportation, and utilities. Mutual aid is intended to provide adequate resources, facilities, and other support to jurisdictions whenever their own resources prove to be inadequate to cope with a given situation."

the last 12 months) are provided to residents and property in neighboring communities. Under the terms of the California Fire Assistance Agreement, the YDFD has responded to and participated in 22 out-of-county assignments in rural California during 2016 alone. Amicus Pala Band currently is a party to ten mutual aid agreements, and has responded to over 1,000 service calls in 2016 alone, including more than 200 responses to calls outside of the Pala Band's territory.

In sum, these mutual and automatic aid agreements help ensure that all Americans – wherever they are located – receive the closest and most professional firefighting and emergency services available to them. While valuable everywhere, these agreements are particularly critical to public safety in rural communities, where tribal lands tend to be located, and where the nontribal community must typically rely on volunteer fire service agencies with more limited resources.

2. Petitioners' and the Government's Pleading-Focused Approaches Substantially Impair Tribes' Public Safety and Emergency Services Functions.

As discussed above in Part I.A.2, in advancing their pleading-focused theory of tribal official immunity, Petitioners and the Government would have this Court apply *Westfall* to tribes. Such a result would

seriously compromise the provision of vital tribal government public health and safety services to both Indian and non-Indian communities.

Congress expressed particular concern for the effect of the *Westfall* decision on law enforcement, public health, and safety. The House Report accompanying the Act noted that potential liability "will have its most severe impact on lower-level employees" but nevertheless found that such exposure "could lead to a substantial diminution in the vigor of Federal law enforcement and implementation." H.R. Rep. No. 100-700, at 3 (1988). The Department of Justice concurred, warning that "Westfall cannot help but to make it far more difficult for Federal agencies to accomplish their missions. Ironically . . . the most directly affected agencies *are likely to be those on the front line of protecting public health and safety*." Legislation to Amend the Federal Tort Claims Act: Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Cong. 58 (1988) ("Westfall Hearing") (statement of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division) (emphasis added); *see also id.* at 33 (statement of Rep. Frank Wolf) (noting that "[e]mployees who are particularly liable include some of the Government's most critical performers, such as law enforcement officials").

Despite these concerns, certain courts, particularly within the Ninth and Tenth Circuits, have extended the mistaken premise of *Westfall* to permit personal capacity suits that involve tribal government

officials and employees, including public health and safety personnel. *See, e.g.*, *Maxwell*, 708 F.3d at 1087-1088 (permitting individual-capacity suit against tribal paramedics); *Pistor*, 791 F.3d at 1114-1115 (permitting individual-capacity suit against tribal officials who, in coordination with state law enforcement officials, detained persons suspected of wrongdoing at tribe's gaming facility). Among other harms, these decisions threaten the "fearless, vigorous, and effective administration of government policies," *Westfall*, 484 U.S. at 297 (quoting *Barr*, 360 U.S. at 571), through mutual aid agreements, especially in the case of employees "on the front line of protecting public health and safety."

Fire, of course, knows no jurisdictional lines. Firefighters and other first responders must make immediate life-or-death decisions without regard to whether the individuals they seek to protect are Indian or non-Indian or whether the burning building sits on trust or fee lands. Saddling these employees with tort liability not incurred by their otherwise immunized state and federal counterparts would endanger, rather than protect, public safety. *Cf.* S. Rep. No. 94-1264, at 5 (1976) (supporting legislation to immunize defense medical personnel, noting that, under threat of liability, "[m]edical personnel could become unduly cautious in administering to patients and begin to make decisions on the basis of what is in the best interest of the physician rather than the patient" and that "[s]uch a development would raise the cost and lower the quality of medical services").

Such a threat would also hamper tribal governments' ability to attract qualified applicants. *See* Westfall Hearing at 58 (statement of Robert L. Willmore) (noting that "as word of this situation spreads, the Federal Government will find it increasingly difficult to attract the brightest and the best candidates"). Recruiting such candidates is already a difficult proposition on tribal reservations, where the post is often isolated and the pay often low. Similar concerns led an earlier Congress to immunize Public Health Service medical personnel through the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868 (1970). The Act attempted to "alleviate some of the more acute problems arising out of critical shortages of physicians and other health personnel," particularly in rural areas, H.R. Rep. No. 91-1662, at 1 (1970), and contained an immunity provision included at the recommendation of the Surgeon General "in recognition of the low pay that so many of those who work in the Public Health Service receive." 116 Cong. Rec. 42,977 (1970) (statement of Sen. Javits). Stripping such immunity from tribal firefighters and other first responders will only exacerbate this problem.

Finally, subjecting tribal police, first responders, and security employees to suit threatens tribes' inherent tribal authority to protect their people and others in their territory. While this Court has recognized the limited divestment of tribal jurisdiction over non-Indians in certain areas, tribes "possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v.*

Reina, 495 U.S. 676, 696-697 (1990). Pursuant to this authority, tribal security officials may "restrain those who disturb public order on the reservation, and if necessary, [] eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id.* at 697; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) ("We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."). Subjecting such an action to suit in state court strikes at the heart of a tribe's ability to manage its internal affairs and security. *See Montana v. United States*, 450 U.S. 544, 566 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

By giving every plaintiff's attorney absolute control over whether and where a tribal public health and safety employee must face suit, Petitioners' and the Government's proposed pleading-focused rule undermines the public services of the "critical performers" exercising crucial aspects of tribal sovereignty. Westfall Hearing at 33 (statement of Rep. Frank Wolf). Tribal firefighting, emergency services, and law enforcement officers put their lives on the line to protect

tribal citizens and non-Indians from harm. These public servants should not face the risk of suit, and potentially ruinous personal liability, for fulfilling important duties for which their federal and state counterparts possess immunity.

II. Petitioners' and the Government's Proposed Rules Jeopardize Tribal Government Treasuries.

This Court consistently has deferred to Congress on questions of tribal sovereign immunity due to "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *accord Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-758 (1998); *see also Bay Mills*, 134 S. Ct. at 2039 ("As *Kiowa* recognized, a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."). Petitioners' argument that "suits against tribal employees do not 'threaten the financial integrity' of a tribe" simply because the judgment itself is enforced against an official's personal assets, and not those of the tribe, Pet. Br. 23-24, is an utter fiction, and one that turns this Court's precedents on their head.

In the experience of Amici Tribes, rules like the ones Petitioners and the Government propose present a substantial threat to tribal treasuries. First, tribes are forced to participate in individual-capacity suits to protect their own interests, as well as those of their officials. Second, Indian tribes indemnify their officials, which is good governance and necessary to retain qualified individuals who could otherwise work for other governments granting them immunity.

A. Litigating Individual-Capacity Suits Threatens Tribal Treasuries.

Petitioners' and the Government's pleading-focused rules will facilitate and inspire litigation against tribal employees and officials, requiring tribes to commit substantial resources to participate in such litigation. As a practical matter, tribes are inevitably and inextricably entangled in suits involving their officials and employees. Like other sovereigns, tribes have a significant governmental interest in participating in suits against tribal officials and employees arising from the performance of their official duties. *See supra* Parts I.B & I.C (discussing threat suits present to the exercise of self-government). Thus, as a consequence of the misguided adoption of a pleading-focused approach by certain courts, Amici Tribes must expend tribal resources to participate, either directly or indirectly, in suits against their officials and employees.

For instance, pleading-focused rules embroil tribes and their officials in civil discovery that depletes tribal

resources. A pleading-focused rule permits plaintiffs to expose tribal officials' and employees' duties to court-sanctioned discovery and ultimately trial based solely on the plaintiffs' tactical choice to seek money damages from the officials themselves. *Grand Canyon Skywalk Dev. LLC v. Cieslak*, No. 2:13-CV-00596-JAD, 2015 WL 4773585, at *7 (D. Nev. Aug. 13, 2015), *aff'd*, No. 215CV00663JADGWF, 2016 WL 890921 (D. Nev. Mar. 7, 2016) (citing *Maxwell* and opining that tribal sovereign immunity does not bar subpoenas served on tribal officers and employees); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1161-1162 (10th Cir. 2014) (leaving open the issue of tribal officials' immunity to civil discovery). Many relevant documents relating to a tribal employee's official duties will be held by the tribe, thus requiring the tribe to respond, or help its employee respond, to intrusive discovery demands, with all the expense and disruption that entails. *See Mitchell*, 472 U.S. at 526; *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1103 (8th Cir. 2012) (noting that subpoenas to tribal officials entail "severe interference with government functions") (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963), and *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989)). And when a tribal employee's defense relies on sensitive documents and information in the tribe's possession, the tribe may not share the employee's interest in releasing those documents, potentially driving a wedge between the tribe and its officials and employees, thereby raising the complexity and attendant cost of litigation and undermining relations between the tribe and the officers and employees on whom it relies.

B. Tribal Treasuries Bear the Burden of Individual-Capacity Suits Through Indemnity of Their Employees.

Petitioners dismiss tribes' responsibility to indemnify their employees as "voluntary," and therefore easily limited or abandoned by tribal governments. Pet. Br. 24. The reality is that tribes have no choice but to indemnify if they are to recruit and retain employees. In the experience of Amici Tribes, tribal governments simply cannot compete with other federal and state employers, especially in high-risk occupations on which public safety depends, if tribal employees are uniquely vulnerable to personal suits. And even if individuals accept the risk concomitant with tribal employment under the pleading-focused approach, tort liability exposure may very well limit tribal employees' willingness to properly perform high risk job duties.

Recruiting and retaining a qualified workforce through indemnity, however, imposes an unpredictable and often hefty burden on the tribal treasury. Indeed, in passing the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(b)-(e)), Congress expressed a clear preference for immunity over indemnity, given the weighty burden state court judgments impose on federal resources, and the friction between jury trials in state court and the federal policy against them. *See, e.g.*, S. Rep. No. 87-736, at 2785-2786 (1961) (noting with approval the warning of the General Services Administration that indemnification "presents the likelihood of considerable difficulties in administration and of heavy expense to the Government, and is open to the further criticism that, as to

actions in State courts, judgments payable by the Government would usually be obtained by trial by jury, a procedure at variance with the requirement . . . that actions against the United States under the Federal Tort Claims Act shall be tried by the court without a jury").

Tribes also bear the increased costs of suits against their officials through insurance premiums under Petitioners' and the Government's pleading-focused approach. *See id.* (government procured liability insurance "would entail substantial and needless expense" when compared to immunity). After *Maxwell*, claims against tribal insurance policies (and self-insured tribal governments) have seen a predictable rise. This increase in claims, and the associated exposure in the state court system through jury trials and punitive damages, has already resulted in self-insured and insurance payouts that exceed the normal ratio to premiums, which inevitably means an increase in premiums. Tribes must either bear these additional costs or abandon insurance coverage to pay increased defense and indemnity costs directly out of tribal coffers.

Finally, given many tribes' chronically limited resources, tribes feel impacts to government treasuries more keenly than other sovereigns. Many tribes remain small and "financially disadvantaged," *Santa Clara Pueblo*, 436 U.S. at 65, struggling to support their governments and citizens with often miniscule resources. They suffer from lack of sufficient land bases and infrastructure, and their members are faced with some of the highest levels of unemployment and poverty in the nation. *See Bay Mills*, 134 S. Ct. at 2045

n.4 (Sotomayor, J., concurring) ("[E]ven reservations that have gaming continue to experience significant poverty, especially relative to the national average."). For instance, Amicus Elk Valley Rancheria subsists solely on the revenue of a small rural gaming facility, supplemented by public- and tribe-funded assistance. Amicus Ewiiaapaayp Band of Kumeyaay Indians has no gaming operations and funds its government through assistance from the federal government and from other tribes with gaming operations. A suit against Elk Valley Rancheria or the Ewiiaapaayp Band's officials or employees could deplete tribal resources to the point that those governments might no longer be able to carry out critical functions, such as assisting members with health care, education, and housing.

Amici also lack parity with state and federal governments with regard to the size of their tax bases, and in the exercise of their taxing authority. *See, e.g.*, *id.* at 2044-2045 (describing the "devastating legacy" of the sale of on-reservation lands to non-Indians, as a result of which "'there is no stable tax base on most reservations'"); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653-654 (2001) (tribal ability to tax generally limited to transactions occurring on tribal lands that significantly involve the tribe or its members).

In short, tribes face precisely the same challenges as their state and federal counterparts – often to a greater degree – but lack an equivalent ability to fund their treasuries. Tribal governance and self-sufficiency are considerably undermined by the allocation of

scarce tribal resources to costs of individual-capacity tort suits rather than the administration of tribal government.

CONCLUSION

For the foregoing reasons, Amici Tribes urge the Court to affirm the decision below.

Respectfully submitted,

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